Filed 11/16/10 Zumbowicz and Gordon v. Hospital Assn. of Southern Cal. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ROSEMARY ZUMBOWICZ and GARY GORDON, individually and on behalf of others similarly situated, Plaintiffs and Appellants, v. HOSPITAL ASSOCIATION OF SOUTHERN CALIFORNIA, et al., Defendants and Respondents.	B215633 (Los Angeles County Super. Ct. No. BC360399)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carl J. West, Judge. Affirmed.

Blecher & Collins, Maxwell M. Blecher, David W. Kesselmen and Theo G. Arbucci; Frank J. Coughlin, Frank J. Coughlin and Caitlyn M. Hobbs, for Plaintiffs and Appellants.

Musick, Peeler & Garrett, William M. Miller, Cheryl A. Orr and Lourdes de La Cruz, for Defendant and Respondent Hospital Association of Southern California.

Latham & Watkins, and Charles H. Samel, for Defendants and Respondents Glendale Activist Medical Center, South Coast Medical Center and White Memorial Medical Center.

Manatt, Phelps & Phillips, Martin J. Thompson, Mandrew L. Satenburg, and Joanna S. McCallum, for Defendants and Respondents Catholic West Healthcare West and St. Joseph Health System.

Sidley Austin, Thomas P. Hanrahan, Jeffrey A. Berman and T. John Fitzgibbons, for Defendant and Respondent Southern California Specialty Care.

Sheppard, Mullin, Richter & Hampton, Richard J. Simmons. Derek R. Havel and Helen C. Eckert, for Defendant and Respondent Memorial Health Services.

Jones Day, Jeffrey A. LeVee and Angel H. Ho, for Defendant and Respondent West Hills Hospital & Medical Center.

Foley & Lardner, Robert C. Leventhal, William Luis Abalona and Eileen Regina Ridley, for California Hospital Association.

INTRODUCTION

Appellants Rosemary Zubowicz and Gary Gordon, acting on behalf of themselves and a class of nurses and technical care specialists, filed a complaint alleging that the Hospital Association of Southern California (HASC) and several hospitals belonging to the HASC conspired to depress nurse wages throughout Southern California in violation of the Cartwright Act (Bus. & Prof. Code, §§ 16720 et. seq.). Specifically, Appellants allege that, in an effort to offset overtime costs resulting from the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999," Defendants entered into a secret agreement to lower the hourly wage rate of nurses by 15 percent.

After two and a half years of litigation, Defendants filed motions for summary judgment arguing that Plaintiffs had failed to identify any evidence of an illicit agreement to depress wages. Plaintiffs opposed the motion, asserting that, under the doctrine of conscious parallelism, they had introduced sufficient circumstantial evidence to raise a triable issue of fact as to the existence of an unlawful agreement. The trial court granted Defendants' motions and entered judgment dismissing the case in its entirety.

On appeal, Plaintiffs argue that: (1) they introduced sufficient circumstantial evidence to raise a triable issue of fact as to whether Defendants entered into an unlawful agreement, (2) the trial court abused its discretion in limiting various categories of discovery, and (3) the trial court erred in sustaining a demurrer to Plaintiffs' unfair business practice claim (Bus. & Prof. Code, § 17200). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. Facts Preceding Plaintiffs' Lawsuit

In July of 1999, the California Legislature enacted Assembly Bill 60, known as the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999" (the Act or AB 60), which reinstated daily overtime provisions that had been repealed by the Industrial Welfare Commission in 1997. (See *Cal. Labor Federation v. Industrial Welfare*

[1] The foregoing is a simplified summary of the facts. Additional facts developed in the course of Defendants' motions for summary judgment will be recounted below, as pertinent to the issues Plaintiffs raise on appeal.

Commission (1998) 63 Cal.App.4th 982, 988-989 [discussing IWC's repeal of eight-hour-day overtime requirement].) The Act mandated that, effective January 1, 2000, all non-exempt employees were to be paid overtime for work in excess of eight hours in a single workday. (*Small v. Superior Court* (2007) 148 Cal.App.4th 222, 226.) Prior to AB 60, employers were only required to pay non-exempt employees overtime for work in excess of 40 hours in a single work week.

Although AB 60 applied to all industries, it presented special problems for hospitals which permitted nurses and other care providers to work 12-hour shifts paid at straight time. Many nurses preferred the option of a 12-hour shift because it allowed them to take more days off or pick up additional shifts at different hospitals. Under AB 60's daily overtime provisions, hospitals would be required to pay overtime for the last four hours of each 12 hour shift, resulting in a significant increase in salary costs. Although these costs could be avoided by replacing 12 hour shifts with 8-hour shifts, hospitals were concerned that mandating 8-hour shifts would affect their ability to recruit and retain nurses. These concerns were compounded by the fact that, at the time AB 60 was passed, California was experiencing a nursing shortage.

In an effort to maintain 12-hour shifts without incurring significant overtime costs, several hospitals decided to implement a 15 percent "equivalency pay reduction" in the hourly pay rate for nurses who worked a 12-hour shift. The 15 percent pay decrease was calculated to offset the wage increase that 12-hour shift nurses would receive as a result of AB 60's overtime requirements. In other words, the pay reduction was structured to provide nurses the same amount of compensation for a 12-hour shift that they had received prior to the passage of AB 60.

B. Plaintiffs' Complaint and Initial Discovery

1. Allegations in Plaintiffs' complaint

Approximately six years after AB 60 went into effect, Plaintiffs Rosemary Zubowicz and Gary Gordon, acting on behalf of themselves and a class of nurses and technical care specialists (collectively nurses), filed a lawsuit against the Hospital Association of Southern California (HASC), which is a trade association comprised of

hospitals in Southern California, and seven hospitals belonging to the HASC (the Hospital Defendants).[2] Collectively, the seven Hospital Defendants owned and operated 18 hospitals throughout Southern California.

Plaintiffs' complaint alleges that, in the latter half of 1999, HASC and the Hospital Defendants conspired to depress nurse wages throughout Southern California in violation of state antitrust law (commonly referred to as the Cartwright Act). Specifically, the complaint contends that, after AB 60 was passed but before it went into effect, "the Hospital Defendants, through the HASC, implemented a scheme to have virtually all member hospitals simultaneously neutralize the effect of California's overtime and eliminate the approximately 17-percent payroll increase that would have been required under the new law." Under this scheme, Defendants allegedly agreed to "institute[] a pay practice, which amounts to a price fixing scheme . . . [¶] . . . [to] reduce the amount of the Straight Time Hourly Rate by approximately 15%."

The complaint asserts that HASC was at the center of the conspiracy and "assisted . . . the Hospital Defendants in instituting and maintaining the pay practice" by, among other things, arranging "secret meetings to disseminate information about the nature and working of the price fixing scheme" and communicating to hospital members "the importance of adopting the pay practice on a group wide basis." The complaint also alleges that Defendants' collusive activity constituted an unfair business practice in violation of Business and Professions Code section 17200.[3]

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[2] Our summary of Plaintiffs' allegations is based on the Third Amended Complaint, which is the operative pleading in this matter. The defendants named in the Third Amended Complaint include HASC, Catholic Healthcare West, Kindred Hospitals West, L.L.C, West Hills Hospital & Medical Center, Glendale Adventist Medical Center, Simi Valley Hospital & Health Care Services, South Coast Medical Center, White Memorial Medical Center and "DOES 1-100." Earlier versions of the complaint named additional individual plaintiffs and defendants.

[3] This cause of action does not appear in the Third Amended Complaint because the trial court previously sustained a demurrer to that claim on standing grounds. The issues concerning the demurrer are discussed below.

2. Trial court proceedings prior to summary judgment

Plaintiffs' class action suit was assigned to a judge in the complex litigation program of the Los Angeles County Superior Court. (See generally Cal. Rules of Court, rule 3.400(c)(1) ["an action is provisionally a complex case if involves . . . [¶] Antitrust . . . claims"].) At the initial status conference meeting, held in July of 2007, the trial court informed the parties that it had established specialized discovery procedures that required Plaintiffs and Defendants to informally exchange their discovery requests in advance of service and obtain court approval for any category of discovery to which either party objected.

During the course of the litigation, the trial court limited certain categories of discovery sought by both parties. For example, the trial court denied Plaintiffs' request to serve written discovery on numerous non-defendant hospitals which were members of HASC, explaining that Plaintiffs should "focus and direct your discovery on those eight or ten [hospitals named in the complaint] for purposes of developing whatever you need to establish the existence of a conspiracy." In addition, the court limited certain document requests pertaining to AB 60 and only permitted Plaintiffs to conduct 10 depositions of hospital personnel to "explore meetings among the defendants and identify other entities who implemented equivalency pay reductions."

3. Defendants' motions for summary judgment

In July of 2008, Defendants filed motions for summary judgment arguing that Plaintiffs had failed to identify any evidence indicating that the hospitals had entered into an agreement to reduce nurse wages. Each Hospital Defendant's motion was accompanied by a declaration stating that, in those instances where an equivalency pay reduction had been adopted, the decision was made independently and not as part of any agreement with any other hospital or the HASC.

After the motions were filed, the trial court instructed Plaintiffs to review the motions and submit a statement describing what further discovery would be necessary to prepare their opposition. In response, Plaintiffs submitted a list of proposed discovery requests, some of which were granted and some of which were denied. Thereafter, the

court provided Plaintiffs approximately four months to conduct additional discovery and file their opposition to Defendants' motions.

In November of 2008, Plaintiffs filed their opposition, which argued that, although they had no direct evidence showing Defendants entered into an unlawful agreement to impose equivalency pay reductions, they had introduced sufficient circumstantial evidence for a reasonable trier of fact to infer the existence of such an agreement. In support, Plaintiffs relied primarily on three categories of evidence: (1) testimony and documentary evidence from non-defendant hospitals indicating that they had participated in HASC-sponsored meetings and phone calls regarding AB 60 where some hospital administrators had revealed that they intended to adopt equivalency pay reductions, (2) a memo HASC sent to its members stating that the "safest course" was to adopt an equivalency pay reduction, and (3) testimony from a non-defendant hospital administrator stating that hospitals that did not adopt equivalency pay reductions would have a competitive advantage in recruiting and retaining nurses over hospitals that did impose such a reduction.

In addition to their arguments on the merits, Plaintiffs contended that, under Code of Civil Procedure section 437c, subdivision (h), a continuance was needed to conduct further discovery. Plaintiffs sought various categories of discovery that the court had denied earlier in the litigation.

In January of 2009, approximately two and half years after the case had been filed, the court heard Defendants' motions for summary judgment and subsequently issued an order that Plaintiffs' evidence was insufficient to raise a triable issue of fact as to the existence of an unlawful agreement to depress nurse wages. The court further ruled that Plaintiffs had failed to establish the need for a continuance to conduct further discovery. Plaintiffs filed a timely appeal from the judgment.

DISCUSSION

Plaintiffs raise three arguments on appeal. First, they contend that they introduced sufficient circumstantial evidence to raise a triable issue of fact as to whether Defendants entered into an agreement to depress nurse wages throughout Southern California in

violation of the Cartwright Act. Second, they argue that the court abused its discretion when it denied various categories of discovery. Third, they argue that the trial court erred in sustaining a demurrer to their Section 17200 unfair business practice claim.

A. Summary Judgment was Proper on Plaintiffs' Cartwright Act Claim

1. Legal Framework for analyzing motions for summary judgment in the context of a Cartwright Act claim

a. Standard of review applicable to motions for summary judgment generally

"A defendant moving for summary judgment has the burden of producing evidence showing that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to that cause of action. [Citation.] The burden then shifts to the plaintiff to produce specific facts showing a triable issue as to the cause of action or the defense. [Citations.] Despite the shifting burdens of production, the defendant, as the moving party, always bears the ultimate burden of persuasion as to whether summary judgment is warranted. [Citation.]" (*Garcia v. W&W Community Development, Inc*. (2010) 186 Cal.App.4th 1038, 1041 (*Garcia*).)

"On appeal, we review de novo an order granting summary judgment. [Citation.] The trial court must grant a summary judgment motion when the evidence shows that there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. [Citations.] In making this determination, courts view the evidence, including all reasonable inferences supported by that evidence, in the light most favorable to the nonmoving party. [Citations.]" (*Garcia, supra,* 186 Cal.App.4th at p. 1041.) Although "the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, [the court] must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact*." (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 856 (*Aguilar*).)

b. Special principles applicable in the context of antitrust claims alleging unlawful conspiracy

In *Aguilar*, *supra*, 25 Cal.4th 826, the California Supreme Court established certain distinct principles "courts must apply in ruling on motions for summary judgment . . . in antitrust actions for unlawful conspiracy (*id.* at p. 843):"

> On the defendants' motion for summary judgment, in order to carry a burden of production to make a prima facie showing that there is a triable issue of the material fact of the existence of an unlawful conspiracy, a plaintiff . . . must present evidence that would allow a reasonable trier of fact to find in his favor on the unlawful-conspiracy issue by a preponderance of the evidence, that is, to find an unlawful conspiracy more likely than not. Ambiguous evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones do not allow such a trier of fact so to find. Antitrust law, including the Cartwright Act, compels the result. Otherwise, it might effectively chill procompetitive conduct in the world at large, the very thing that it is designed to protect [citation] by subjecting it to undue costs in the judicial sphere. Therefore, in addition, the plaintiff must present evidence that tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently rather than collusively.

(*Id*. at p. 852.)[4]

Thus, "while normal summary judgment principles apply in antitrust cases, 'an important distinction exists.' [Citation.] The distinction is that 'certain "inferences may not be drawn from circumstantial evidence in an antitrust case."' [Citations.]" (*Eddins v. Redstone* (2005) 134 Cal.App.4th 290, 328 (*Eddins*).) Specifically, "'[a]mbiguous

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[4] *Aguilar's* holding was based on *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.* (1986) 475 U.S. 574, in which the United States Supreme Court described how courts should analyze motions for summary judgment involving claims arising under the federal antitrust statute, commonly referred to as the Sherman Act. (*Aguilar*, *supra*, 25 Cal.4th at pp. 846-847, 851-852.) Prior to *Aguilar*, the California Supreme Court acknowledged that "the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law. Consequently, federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act." (*Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 925; see also *Redwood Theatres, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 694 [because "relevant case law under the Cartwright Act is comparatively sparse," state decisions involving Cartwright Act claims often "rely chiefly on federal [antitrust] decisions"].) Consistent with these holdings, our decision relies on both state decisions interpreting the Cartwright Act and federal decisions interpreting the Sherman Act.

evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones do not allow' a trier of fact 'to find an unlawful conspiracy more likely than not.' [Citation.]" (*Ibid.*; see also *Aguilar, supra*, 25 Cal.4th at p. 852; *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.* (1986) 475 U.S. 574, 588 ["conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support even an inference of conspiracy"].) As a result of these distinct features, courts have held that, when opposing a motion for summary judgment in the context of an antitrust claim alleging unlawful collusion, plaintiffs face a "demanding standard of proof." (*In re Baby Food Antitrust Litigation* (9th Cir. 1999) 166 F.3d 112, 118 (*Baby Food*).)

2. Summary judgment was proper

As the parties moving for summary judgment, the Defendants were required to make an initial prima facie showing of the nonexistence of any triable issue of material fact as to whether they entered into an unlawful agreement in violation of the Cartwright Act. (See generally *Eddins*, *supra*, 134 Cal.App.4th at p. 303.) Specifically, Defendants were required to make a prima facie showing that they did not agree among themselves to impose a 15% equivalency pay reduction on nurse wages.

In support of their respective motions for summary judgment, each Hospital Defendant submitted a declaration stating that, in those instances where an equivalency pay reduction had been adopted, the decision was reached independently, and not as part of any agreement with any other hospital or the HASC. Plaintiffs concede that, through these declarations and other evidentiary submissions, Defendants satisfied their burden to make a prima facie showing that they had not collectively agreed to impose equivalency pay reductions.

Because Defendants satisfied their initial evidentiary burden, Plaintiffs were required to produce specific facts showing that there was a triable issue as to whether Defendants entered into an illegal agreement to impose equivalency pay reductions. Generally, a plaintiff may show "concerted action . . . by either direct or circumstantial evidence. Direct evidence explicitly refers to an understanding between the alleged

[antitrust] conspirators, while circumstantial evidence requires additional inferences in order to support a conspiracy claim." (*Golden Bridge Technology, Inc. v. Motorola, Inc*. (5th Cir. 2008) 547 F.3d 266, 271.)

In this case, Plaintiffs do not contend that they have provided direct evidence demonstrating that Defendants entered into an agreement to impose equivalency pay reductions. Instead, they argue that, under the theory of "conscious parallelism," they have introduced sufficient circumstantial evidence to permit a trier of fact to reasonably infer the existence of such an agreement.

a. Summary of conscious parallelism

"Allegations of concerted action by competitors are frequently based on a pattern of uniform business conduct, which courts often refer to as 'conscious parallelism.'" (*In re Travel Agent Commission Antitrust Litigation* (2009) 583 F.3d 896, 903.) The term "conscious parallelism" refers to "the process 'not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a prefixed maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.' [Citation.]" (*Baby Food, supra,* 166 F.3d at p. 121). "To establish consciously parallel behavior, [a plaintiff] 'must show (1) that the defendants' business behavior was parallel, and (2) that the defendants were conscious of each other's conduct and that their awareness was an element in their decisional process.' [Citation.]" (*Eddins, supra,* 134 Cal.App.4th at p. 305.)

"Evidence of conscious parallelism alone, however, does not permit an inference of conspiracy." (*Eddins, supra,* at p. 305.) "The inadequacy of showing parallel conduct . . . without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." (*Bell Atlantic Corp. v. Twombl*y (2007) 550 U.S. 544, 554.) Therefore, "plaintiffs basing a claim of collusion on inferences from consciously parallel behavior [must] show that certain 'plus factors' also exist." (*In re Flat Glass Antitrust Litigation* (3rd Cir. 2004) 385 F.3d 350, 360 (*Flat*

Glass); see also *Eddins, supra,* 134 Cal.App.4th at p. 305 [conscious parallelism requires evidence of "plus factors"].) "Existence of these plus factors tends to ensure that courts punish 'concerted action' - an actual agreement - instead of the 'unilateral, independent conduct of competitors.' [Citation.] In other words, the factors serve as proxies for direct evidence of an agreement." (*Flat Glass, supra,* 385 F.3d at p. 360.)

In sum, "to establish illegal concerted action based on 'consciously parallel behavior, a plaintiff must show (1) that the defendants' behavior was parallel; (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making process; and (3) certain "plus" factors.' [Citation.]." (*Flat Glass, supra,* 385 F.3d at p. 360, fn.11; see also *Eddins, supra,* 134 Cal.App.4th at p. 305.)

b. Insufficient evidence of parallel behavior

The first factor Plaintiffs must establish to show an agreement based on conscious parallelism is that Defendants engaged in "parallel" conduct. Although Plaintiffs need not establish "exact uniformity of detail . . . more than a general similarity of action is required for a finding of consciously parallel behavior." (*Harlem River Consumers Co-op., Inc. v. Associated Grocers of Harlem, Inc*. (D.C.N.Y. 1976) 408 F.Supp. 1251, 1277 (*Harlem River*); see also *Battipaglia v. New York State Liquor Authority* (2d Cir. 1984) 745 F.2d 166, 175 (*Battipaglia*) [conscious parallelism requires "identical or nearly identical" conduct].)

Plaintiffs' Third Amended Complaint names seven Hospital Defendants, which collectively own and operate a total of 18 hospitals in Southern California. It is undisputed that of these 18 hospitals, only one hospital mandated an equivalency pay reduction "that adjusted the straight time base hourly rate of pay for . . . 12 hour shift registered nurses." Nine other hospitals permitted nurses within units who worked 12-hour shifts to vote on whether they preferred to convert to 8 hour shifts and retain their level of hourly base pay, or, alternatively, retain 12 hour shifts with an equivalency pay reduction. The remaining eight hospitals did not adopt an equivalency pay reduction of any kind.

In light of these varied responses to AB 60, demonstrating almost half of the named defendants did not adopt an equivalency pay reduction, almost half did so only after employees voluntarily chose to adopt such reductions in lieu of eight-hour shifts,[5] and only one imposed a mandatory wage reduction on all nurses working 12-hour shifts, we conclude that Plaintiffs have failed to introduce sufficient evidence of parallel conduct.

Despite the variety of conduct engaged in by the Hospital Defendants named in this case, Plaintiffs argue that we may nevertheless infer parallel conduct from other evidence in the record. First, it contends that we can infer such behavior from a memorandum that Riverside Community Hospital, who is not a defendant in this case, issued to 12-hour shift employees. The memo discusses administrative changes resulting from the hospital's adoption of an equivalency pay reduction and includes the following statement: "it is estimated that approximately 75% of the California hospitals that were impacted by this legislation have implemented these types of programs in order to keep 12 hour shifts for their employees." In Plaintiffs' view, this memo is sufficient to demonstrate that the Hospital Defendants engaged in parallel behavior.

There are multiple problems with this argument. First, nothing in the Riverside memo alters the fact that almost half of the hospitals that the Defendants administer did not impose an equivalency pay reduction and a majority of the remaining hospitals did so only after allowing their employees to vote on the issue. Second, although Plaintiffs contend that the document raises an inference that a majority of California hospitals acted in a uniform manner in responding to AB 60, the statement "75% [of hospitals] . . . have implemented these types of programs" is too vague to reasonably support such an inference. Even if we assume that the phrase "these types of programs" is referring to equivalency pay reductions and that 75 percent of hospitals actually adopted such

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[5] Plaintiffs do not allege that the Defendants conspired to force employees to choose between an eight-hour shift or a 12-hour shift with an equivalency pay reduction. Instead, they allege only that the Hospital Defendants conspired to impose equivalency pay reductions.

programs, the memo does not explain how those plans were implemented (was the plan mandated or did employees vote on it?), who was affected by the plans (all units of nurses or just some units?), or any specific details about the actual pay reduction plan. As a result, it would be wholly speculative to conclude that hospitals throughout California engaged in uniform, parallel behavior based on this single statement.

Plaintiffs next argue that we can infer parallel conduct from evidence that purportedly demonstrates that hospitals, with the support of HASC, urged one another to adopt equivalency pay reductions. Although this evidence might be relevant to determining whether Defendants entered into an agreement (an issue discussed in more detail below), it is not relevant to determining whether the Defendants' conduct in this case was actually "parallel." In other words, the fact that hospitals may have encouraged one another to adopt equivalency pay reductions does not alter the fact that the Hospital Defendants here did not engage in parallel conduct.

Plaintiffs also argue that, under well established principles of antitrust law, the fact that many of the named defendant hospitals did not implement equivalency pay reductions is irrelevant because "[i]n a price-fixing case, a plaintiff need only show that two or more competitors entered into an agreement to fix prices. There is no requirement to show that all, or even close to all hospitals in a given area participated in the agreement." It is true that an agreement to fix prices between two competitors is sufficient to establish an antitrust claim. However, it is equally clear that, when attempting to prove the existence of an agreement through a theory of conscious parallelism, plaintiffs must demonstrate a high degree of uniform conduct among the defendants. (*Battipaglia, supra,* 745 F.2d at p. 175) [conscious parallelism requires "identical or nearly identical" conduct].) Where half of the named entities did not engage in the very behavior that is the subject of the plaintiffs' complaint, there is no basis for applying the doctrine of conscious parallelism.[6]

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[6] In a related argument, Plaintiffs contend that they need not show that Defendants engaged in "identical changes," but only that Defendants altered their normal pricing patterns (in this case nurse wage levels) in some manner. In support, it cites cases ruling

Finally, Plaintiffs argue that we should ignore the fact that eight of the hospitals owned and operated by the Hospital Defendants did not impose equivalency pay reductions because "[t[he trial court was advised that plaintiffs had dismissed various hospitals from the case after the defendants provided affirmative evidence that those hospitals had not implemented pay reductions." This conclusory argument appears in a footnote without any legal citation or references to the record. Plaintiffs do not identify which entities were dismissed or when they dismissed them, nor do they include any legal discussion in support of their contention. As a result, we may treat the argument as waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*) ["'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' [Citations.]"]; (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545 (*Mansell*) [reviewing court not "required to search the record to ascertain whether it contains support for [a parties'] contentions"]; *Lyles v. State* (2007)

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that deviations from an agreed upon course of conduct by some conspirators is insufficient to defeat an antitrust claim. As a preliminary matter, the cases Plaintiffs cite involved direct evidence of collusion, not circumstantial evidence predicated on conscious parallelism, and are therefore of limited relevance. (See, e.g., *Plymouth Dealers' Assn. v. United States* (9th Cir. 1960) 279 F.2d 128, 130-131 [defendants admitted they had "agree[d] on a fixed uniform list price" but argued such an agreement did not, standing alone, constitute violation of antitrust laws]; *United States v. Utah Pharm. Assn.* (D. Utah 1962) 201 F.Supp 29, 34-35 [direct evidence established "adoption, publication and distribution of the price schedule"]; *Catalano, Inc*. v. *Target Sales, Inc*. (1980) 446 U.S. 643, 644 [accepting as true allegation that "wholesalers secretly agreed, in order to eliminate competition among themselves, that . . . they would sell to retailers only if payment were made in advance or upon delivery].) Moreover, in this case we are analyzing whether Defendants' conduct is sufficiently uniform to raise an inference of collusion, not whether minor deviations from a proven agreement are fatal to an antitrust claim. Finally, as we have discussed, the evidence here does not merely show slight differences between the Defendants' conduct; rather, it shows that almost half of the Hospital Defendants did not adopt equivalency pay reductions and half did so only after an employee vote.

153 Cal.App.4th 281, 285, fn. 3 (*Lyles*) [refusing to consider argument raised "in conclusory fashion via footnote"].)

In any event, when a plaintiff is proceeding under a theory of conscious parallelism, it is relevant that a significant portion of the originally named defendants did not engage in the conduct complained of. The theory of conscious parallelism is predicated on the assumption that concerted action may be inferred from uniform conduct by a significant portion of competitors within a concentrated market. (See generally *Baby Food, supra,* 166 F.3d at p. 121.) Where, as here, a large portion of the originally named defendants did not engage in the alleged conduct at issue, that fact is necessarily relevant to determining whether Plaintiffs established parallel behavior. (See, e.g., *Flat Glass, supra*, 385 F.3d at p. 363 ["If six firms act in parallel fashion and there is evidence that five of the firms entered into an agreement, for example, it is reasonable to infer that the sixth firm acted consistent with the other five firms' actions"].)

c. Plaintiffs have failed to introduce evidence that Defendants were conscious of each other's activity

Plaintiffs have also failed to identify sufficient evidence that that "the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making process." (*Flat Glass, supra,* 385 F.3d at p. 360, fn.11; see also *Eddins, supra,* 134 Cal.App.4th at p. 305.) To make such a showing, Plaintiffs must establish not only that the Defendants "were aware generally of their competitors' practices" but also that "'their awareness was an element in their decisional process.' [Citation.]" (*Eddins, supra,* 134 Cal.App.4th at p. 305.)

Plaintiffs argue that there is substantial evidence that each of the Hospital Defendants "knew in advance that the majority of competitor hospitals were going to implement pay reductions for 12-hour shift employees." In support, Plaintiffs cite to (1) testimony from non-defendant witnesses stating that they participated in HASC-hosted conferences and phone calls where competitors discussed potential responses to AB 60, and (2) an HASC memo that purportedly encouraged member hospitals to adopt

equivalency pay reduction schemes.[7] In Plaintiffs' view, this evidence is sufficient "to show the Hospital Defendants were consciously aware of what their competitors were doing."

Regardless of whether Plaintiffs' evidence is sufficient to infer that the Hospital Defendants were generally aware of each others conduct, Plaintiffs' briefs fail to discuss whether that awareness "was an element in [the Defendants'] decisional process." (*Eddins, supra*, 134 Cal.App.4th at p. 305.) In *Eddins, supra*, the appellate court made clear that, to avoid summary judgment, a plaintiff proceeding under a theory of conscious parallelism must show not only that defendants had "knowledge" of one another's conduct, but also that the "defendant actually *relied* upon its awareness of the other defendants' conduct in making its . . . decisions." (*Id.* at p. 308.) The court further explained that, although defendants' files were allegedly "overflowing" with documentary evidence demonstrating their awareness of competitor conduct, such evidence did not "show that [defendants] used the [information] in their decision-making." (*Ibid.*)

Because Plaintiffs' briefs fail to address whether there was evidence that the Hospital Defendants actually relied on their knowledge of competitor conduct in the decision making process, it has not satisfied the second factor required under the conscious parallelism test.[8]

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[7] Both parties acknowledge that the trial court sustained foundational evidentiary objections to a significant portion of Plaintiffs' evidence but went on to consider these exhibits in ruling on the motions for summary judgment. Because the trial court considered these exhibits, and no party has objected to its decision to do so, we do the same.

[8] The record does contain evidence suggesting that one non-defendant hospital considered competitor conduct in formulating a response to AB 60. In deposition testimony, two employees of Tenet Hospital, who is not a defendant in this lawsuit, stated that, in making the decision to impose equivalency pay reductions, information regarding competitor conduct was "of interest to us." It is unclear whether evidence showing that employees of a single non-defendant hospital considered its competitors' conduct in imposing equivalency pay reductions would be sufficient to infer that the Hospital

d. Insufficient evidence of "plus factors"

Even if we assume Plaintiffs introduced sufficient evidence to raise a triable issue of fact as to whether Defendants engaged in consciously parallel behavior, to survive summary judgment, they must also introduce "significant probative" evidence of certain plus factors. (*Eddins, supra*, 134 Cal.App.4th at p. 309.) "Although '[t]here is no finite set of such criteria,'" (*In re Insurance Brokerage Antitrust Litigation* (3rd Cir. 2010) 618 F.3d 300, 321-322 (*Insurance Brokerage*)), courts have identified at least three such plus factors: (1) "evidence that the defendant acted contrary to its interests"; (2) "evidence that the defendant had a motive to enter into a price fixing conspiracy;" and (3) "evidence implying a traditional conspiracy." (*Ibid.)* Plaintiffs' evidence is insufficient to satisfy any of these factors.

i. There is insufficient evidence to infer that Defendants acted contrary to economic interest

"The most important plus factor is that the alleged action would have been against the self interest of any actor who engaged in it alone." (*Von Kalinowski on Antitrust* § 11.02[2](b); *see also Eddins, supra*, 134 Cal.App.4th at pp. 305-306.) "That is, the plaintiff 'must establish that each defendant would have acted unreasonably in a business sense if it had engaged in the challenged conduct unless that defendant had received assurances from the other defendants that they would take the same action.' [Citation.]" (*Eddins, supra*, 134 Cal.App.4th at p. 314, fn. 20; see also *Flat Glass, supra,* 385 F.3d at p. 360 ["Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market"].) "It is the [Plaintiffs'] burden to present sufficient evidence to support their

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Defendants acted in a similar matter. (See, e.g., *Clamp-All Corp. v. Cast Iron Soil Pipe Institute* (1st Cir. 1988) 851 F.2d 478, 484 ["jury could not find, without impermissible speculation, that . . . defendants priced couplings below their costs" based on evidence showing price list of competitor's couplings].") However, because Plaintiffs' have not argued that the evidence supports such and an inference or that the Hospital Defendants actually relied on their awareness of competitor conduct, we need not address the issue. (See *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["court is not required to examine undeveloped claims, nor to make arguments for parties"].)

claim that the [Defendants] acted contrary to their economic interests in this case [and the evidence must] . . . '"tend[] to exclude the possibility" that the alleged conspirators acted independently.' [Citations.]" (*Houser v. Fox Theatres Management Corp*. (3d Cir. 1988) 845 F.2d 1225, 1232.)

Plaintiffs theorize that "it was important for most Hospital Defendants to adopt the pay reduction scheme because otherwise, if a competitor hospital did not follow suit, then that non-complying hospital paying proper overtime would have . . . a competitive advantage [in recruiting and retaining nurses] over . . . rivals that had reduced the base pay of 12-hour shift nurses." In other words, Plaintiffs assert that it would have been against a hospital's self-interest to unilaterally impose an equivalency pay reduction because its nurses would then leave to work for a competitor who did not impose an equivalency pay reduction, where the nurses would presumably receive more pay.

Plaintiffs rely on two pieces of evidence in support of their theory. First, they cite deposition testimony from an administrator who worked at Tenet Hospital, which is not a defendant in this case. After being asked whether he believed Tenet would have a competitive advantage in recruiting and retaining nurses if other hospitals imposed equivalency pay reductions but Tenet did not, the witness stated: "Yes . . . [¶] . . .[w]e would be at a competitive advantage . . . [¶] . . . [¶] . . . because if we didn't reduce the rates and left them at the rates prior to January 1, 2000, then the last four hours of the 12-hour shift would be paid at the original rate time and a half so a nurse would make quite a bit more than they would have prior to . . . December." Second, Plaintiffs rely on evidence that, at the time AB 60 was passed, there was a nursing shortage in California. Plaintiffs contend that this evidence is sufficient for a trier of fact to reasonably infer that unilaterally implementing equivalency pay reductions was against a hospital's self interest because it would cause nurses to seek employment at competitor hospitals that did not impose an equivalency pay reduction.[9] There are numerous reasons why

[9] Plaintiffs also cite extensive evidence indicating that hospitals were under competitive pressure to retain 12-hour shifts because nurses preferred 12-hour shifts to eight-hour shifts. Plaintiffs' antitrust claim, however, is not that the hospitals conspired

Plaintiffs' evidence is insufficient to support their theory.

A. Plaintiffs' theory depends on assumptions not supported by the evidence

Initially, Plaintiffs' theory that nurses would leave hospitals that imposed an equivalency pay reduction to work for hospitals that did not impose such a reduction is predicated on assumptions that are not supported by any evidence in the record. First, Plaintiffs' theory requires us to assume that a nurse would necessarily leave one hospital to work at another hospital based solely on an increase in compensation. There are any number of factors that might impact a nurse's employment decision aside from compensation, including, for example, seniority, benefits, location, job security and quality of life considerations. Plaintiffs failed to introduce any expert testimony or statistical evidence suggesting that nurses would actually behave in the manner they suggest. Instead, they offer the testimony of a single lay witness, who, in effect, simply states an economic truism: offering higher salary to an employee provides a recruiting advantage over competitors. But it is certainly not the only factor relevant to an employment decision.

In *Eddins*, *supra*, 134 Cal.App.4th 290, the appellate court rejected an analogous argument. Plaintiffs in *Eddins* alleged that Blockbuster, Inc. and several studios had entered into an unlawful conspiracy in which the studios agreed not to offer independent video retailers a specialized type of distribution contract that they offered to Blockbuster. Plaintiffs theorized that because the studios had made significant profits under its distribution agreement with Blockbuster, it would be irrational for an individual studio to refrain from entering into a similar agreement with independent video retailers.

The court rejected the argument, explaining that Plaintiffs' theory "requires the simplistic assumption that output revenue-sharing contracts with distributors serving independent retailers must necessarily produce an increase in revenues, just as Blockbuster's did, and ignores the significant differences between small retailers served

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to retain a 12-hour shift but rather that they conspired to adopt equivalency pay reductions.

by distributors and large chains . . . . [¶] . . . that might affect the success of such contracts in generating increased revenues. It is simply unreasonable to infer . . . that output revenue-sharing contracts with distributors for independent retailers would have been successful, and that the studios therefore acted against their economic interests by not promptly offering contracts to distributors for independent retailers." (*Eddins, supra,* at p. 310.) Similarly, in this case, Plaintiffs' theory requires the "simplistic assumption" that nurses would leave one hospital to work at another hospital because one pays more, without taking into consideration a myriad of other factors that might impact such a decision.

A second assumption underlying Plaintiffs' theory is that a nurse working a 12-hour shift at a hospital that adopted a 15 percent equivalency pay reduction would necessarily receive less compensation than a nurse working at a hospital that did not impose such a salary reduction. However, that is only true if, prior to the passage of AB 60, all hospitals were paying their nurses approximately the same base hourly wage. For example, if a hospital was initially paying its nurses a wage that was 15 percent higher than its competitors, and then imposed an equivalency pay reduction, nurses would not receive any more pay at a competing hospital that did not impose an equivalency pay reduction. Stated more simply, without any evidence that hospitals were paying nurses the same approximate amount prior to AB 60, it is impossible to determine whether nurses would make more money (or how much more money) at a hospital that did not impose equivalency pay reductions. Plaintiffs have presented no evidence related to nurse salary, which is critical to its theory.

B. Plaintiffs' theory ignores business justifications for equivalency pay reductions

A second problem with Plaintiffs' theory is that an act is only "contrary to self interest" if there is an "an absence of an independent business reasons for the challenged conduct." (*Eddins, supra,* 134 Cal.App.4th at p. 319; see also *Southway Theatres, Inc. v. Georgia Theatre Co.* (5th Cir. 1982) 672 F.2d 485, 494 (*Southway Theatres*) ["basic rule" is that "inference of a conspiracy is always unreasonable when it is based solely on

parallel behavior that can be explained as the result of the independent business judgment of the defendants"].) In this case, evidence in the record shows that there was an obvious business justification for adopting equivalency reduction plans: retaining a 12-hour shift without adopting an equivalency pay reduction "would have increased a hospital's expenses for nurses and therapists (a typical hospital's larges single expense) by about 15%." Plaintiffs' evidence includes testimony from a hospital administrator who stated that, without imposing an equivalency pay rate reduction, the hospital "could not possibly afford" to pay overtime associated with a 12-hour shift. A second administrator testified that although management had considered retaining a 12-hour shift without imposing an equivalency pay reduction, it decided against that option due to the "cost issues associated with that decision." Because hospitals had an obvious financial interest in imposing equivalency plan reductions in light of the change in overtime law, Plaintiffs have failed to demonstrate that reducing nurses' wages was "an action against self interest."

C. No evidence that costs associated with employee departures would outweigh savings from pay reduction

A closely related problem with Plaintiffs' argument is that, even assuming a hospital might lose some employees by adopting an equivalency pay reduction, it would still be in a hospital's interest to adopt salary reductions if the financial savings in wage payments outweighed any negative impacts resulting from employee departures. Plaintiffs failed to introduce any evidence that the potential employee retention problems caused by imposing an equivalency pay reduction would necessarily be more costly than paying overtime without reducing salaries. Instead, Plaintiffs rely on a witness statement indicating that, as a general matter, not adopting an equivalency pay reduction would provide a competitive advantage in the recruitment of nurses; the witnesses did not, however, state that such actions would provide hospitals an overall competitive advantage against other hospitals.

D. Plaintiffs' theory is refuted by the evidence in the record

The final problem with Plaintiffs' theory is that it is refuted by evidence in the record. As discussed above, only half of the hospitals owned and operated by the Hospital Defendants actually imposed equivalency pay reductions. Therefore, it is clear that numerous hospitals adopted equivalency pay reductions despite the fact that other hospitals did not follow a similar course of conduct. Moreover, Plaintiffs have introduced no evidence indicating that the 10 defendant hospitals that did impose equivalency pay reductions suffered a competitive disadvantage in retaining nurses in comparison to the eight defendant hospitals that did not impose such reductions. This sheds considerable doubt on Plaintiffs' simplistic assumption that a hospital necessarily acted against its self interest in unilaterally imposing equivalency pay reductions without assurances that all hospitals would follow suit.

In sum, there are at least four reasons why Plaintiffs have failed to raise a triable issue of fact as to whether, in the absence of an agreement, it would have been against a hospital's self interest to unilaterally adopt an equivalency plan: (1) there is insufficient evidence to support Plaintiffs' assumption that nurses would leave a hospital that imposed a reduction plan to work for a competitor that did not; (2) hospitals had a sound business justification for adopting the equivalency plan: to avoid significant overtime costs that would have otherwise resulted from AB 60's overtime provisions; (3) there is no evidence that the harm associated with employee departures would outweigh the cost savings derived from the adoption of an equivalency plan, and (4) numerous hospitals did not impose an equivalency pay plan.[10]

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[10] In contrast to this case, *Toys "R" Us v. FTC* (7th Cir. 2000) 221 F.3d 928, 932 (*Toys "R" Us*) presents a paradigm example of an antitrust case in which the plaintiff introduced sufficient evidence that defendants acted against self interest. Plaintiffs, who were a group of warehouse clubs that sold items at a lower markup than traditional retail outlets, alleged that Toy's R Us (TRU) and several toy manufacturers had entered into a collusive agreement not to sell items to warehouse clubs that they sold to TRU. Internal documentation from the manufacturers revealed that, prior to their agreements with TRU, the toy retailers "were trying to expand, not to restrict, the number of their major retail

ii. Plaintiffs have introduced no evidence of "motive"

The second traditional "plus" factor that courts use to evaluate evidence of conscious parallelism is whether the defendants had a motive to enter into the alleged price fixing agreement. (*Eddins, supra*, 134 Cal.App.4th at p. 309; *Flat Glass, supra*, 385 F.3d at p. 360.) "In the context of parallel pricing . . . . [e]vidence that the defendant had a motive to enter into a price fixing conspiracy means evidence that the industry is conducive to oligopolistic price fixing, either interdependently or through a more express form of collusion. In other words, it is 'evidence that the structure of the market was such as to make secret price fixing feasible.' [Citation.]" (*Flat Glass, supra*, 385 F.3d at p. 360; see also *In re EPMD Antitrust Litigation* (D. Conn. 2009) 681 F. Supp.2d 141, 169-170 ["the 'motive to conspire' plus factor" requires showing that "characteristics of the [relevant] market make collusion feasible"].) Plaintiffs have not introduced any evidence indicating that the hospital industry, or the market for hospital nurses, is oligopolistic in nature and therefore conducive to price fixing. As a result, Plaintiffs have made no showing on this plus factor.

Plaintiffs appear to take a broader view of the term "motive," arguing that this plus factor is satisfied any time a defendant might have benefitted financially from the alleged unlawful agreement. For example, at oral argument, Plaintiffs stated that, under conscious parallelism, "motive" was established because the Defendants are "saving oodles and oodles of money at the expense of a nurse." We do not agree that simply showing a defendant had a financial incentive to collude (a factor that would presumably be present in almost any antitrust case) satisfies a plus factor. Rather, we agree with those courts holding that "motive" means evidence that the relevant market "is one in which secret price fixing might actually have an effect on price and thus be worth

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outlets and to reduce their dependence on TRU. They were specifically interested in cultivating a relationship with the warehouse clubs and increasing sales there." (*Id.* at p. 932.) As a result, "the sudden adoption of measures under which they decreased sales to the clubs ran against their independent economic self-interest." (*Ibid.*) No comparable evidence is present here.

attempting." (*In re High Fructose Corn Syrup Antitrust Litigation* (7th Cir. 2002) 295 F.3d 651, 656.)

iii. Traditional evidence of conspiracy

The third "plus factor" is "'evidence implying a traditional conspiracy.'" This factor "consists of 'non-economic evidence "that there was an actual, manifest agreement not to compete,"' which may include '"proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown."' [Citation.]" (*Insurance Brokerage Antitrust Litigation, supra,* 618 F.3d at p. 321; see also *Eddins, supra,* 134 Cal.App.4th at p. 314, fn. 20.)

Plaintiffs argue that there are three categories of evidence that imply traditional conspiracy: (1) various HASC-hosted meetings and phone calls during which hospital administrators discussed potential responses to AB 60; (2) a memo circulated by HASC that refers to equivalency pay reductions as "the safest course," and (3) other statements and documents demonstrating that hospitals were collectively discussing AB 60 and aware of competitors' planned response to AB 60. We review each category of evidence independently and then consider whether, when considered as a whole, Plaintiffs' evidence of traditional conspiracy is sufficient to raise an inference of unlawful conspiracy.

In conducting our review, we adhere to the California Supreme Court's instruction that "[a]mbiguous evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones" does not support an inference of conspiracy. (*Aguilar, supra,* 25 Cal.4th at p. 852.)

A. HASC-sponsored meetings and calls

The first alleged evidence implying a traditional conspiracy consists of a series of meetings and phone calls that HASC hosted regarding AB 60. The record indicates that, during the latter half of 1999, HASC held several conferences that were intended to "discuss strategies on how to deal with the [AB 60]." These conferences were attended

by numerous hospital administrators, but were generally closed to unions and other employee representatives. A third party witness who attended some of these meetings stated that "generally, [the meetings were] regarding the change in law and options that facilities had in order to do what was best for their facility or their staff in compliance." The witness further stated that equivalency pay reductions were discussed and described as a "lawful" means of complying with AB 60.

In addition to these meetings, HASC coordinated several conference calls with hospital administrators regarding AB 60. An employee of a non-defendant hospital testified that HASC used the calls to update hospitals on "any changes going on with [AB 60] . . . as it was being clarified through the IWC and would typically take comments and people would ask questions, and it was a -- kind of an interactive call." Specifically, the witness explained that some hospitals said they were going to adopt an equivalency pay reduction, others said they were going to pay overtime without pay reductions, and still others said they intended to continue paying their employees straight time for full 12-hour shifts.[11] Finally, the witness stated that, although "different options were discussed," she was left with the impression that her hospital would "not be in the minority" if it adopted an equivalency pay reduction, clarifying that at no time did HASC encourage the adoption of equivalency pay reductions.

Plaintiffs' evidence of HASC-hosted meetings and phone calls does not, standing alone, raise a permissible inference that the Hospital Defendants entered into an agreement to adopt equivalency pay reductions because the witnesses' description of those events is "not . . . inconsistent with lawful behavior." (*In re Citric Acid Litigation* (9th Cir. 1999) 191 F3d. 1090, 1095. (*Citric Acid*)) Courts have long recognized that "[a] trade association has several important aspects, including, representing members' views to legislators, gathering and disseminating the latest industry information and providing

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[11] Plaintiffs argue that, by informing each other how they intended to respond to AB 60, hospitals effectively exchanged future pricing information. However, merely stating an intention to adopt (or not adopt) an equivalency pay reduction cannot be equated with sharing future salary or wage pricing information because there is no evidence that hospitals told each other how much they were actually paying their nurses.

[ ]for networking opportunities and education." (*Self-Insurance Institute of America, Inc. v. Software and Information Industry Assoc.* (C.D. Cal. 2000) 208 F.Supp.2d 1058, 1073; see also *Citric Acid, supra*, 191 F.3d at p. 1098 ["trade associations often serve legitimate functions, such as providing information to industry members, conducting research to further the goals of the industry, and promoting demand for products and services"].) Moreover, "'communications between competitors do not permit an inference of an agreement to fix prices 'unless "those communications rise to the level of an agreement, tacit or otherwise."' [Citation.]" (*Citric Acid, supra*, 191 F.3d at p. 1104.)

Although Plaintiffs contend that the trier of fact might infer that hospitals used HASC meetings to acquire unspoken assurances that most competitors would impose equivalency pay reductions, an equally plausible interpretation of the evidence is that the HASC and the hospitals met to educate themselves on the various ways an entity might respond to AB 60's requirements, and then used that information to independently decide which option was best for their institution. Although some of the phone call participants allegedly described how their individual institutions were going to respond to AB 60, those responses were not uniform and described several different options. Additionally, there is no evidence that the HASC encouraged hospitals to formulate, or that hospitals discussed formulating, a uniform response to AB 60 during any meeting or phone call.

Because Plaintiffs' evidence could be plausibly interpreted as either evidence of an illicit agreement or evidence of lawful conduct, it is "not sufficient in itself to preclude summary judgment." (*Citric Acid, supra*, 191 F.3d at p. 1103-1104 ["evidence [that] could be interpreted as evidence of a horizontal conspiracy but also could be construed in a benign light . . . [is] "not sufficient in itself to preclude summary judgment."]; see also *Richards v. Neilsen Freight Lines* (9th Cir. 1987) 810 F.2d 898, 903 (*Richards*) [testimony that competitors had "gentlemen's agreement" could be interpreted as either evidence of an illicit agreement or evidence of lawful conduct and was therefore "[in]sufficient to overcome the motion for summary judgment"].)

B. The "Safest Course" Memo

The second piece of evidence Plaintiffs cite is an email that HASC sent to its member hospitals on November 5, 1999, along with a memo summarizing the legal effects of AB 60. The text of the email states:

> You have received a memorandum from the California Healthcare Association (CHA) dated November 4, 1999, describing the situation relative to AB 60.
>
> The CHA memo urges all members to consult their legal and labor counsel immediately. Time is of the essence. CHA is working hard to obtain favorable action by the Industrial Welfare Commission (IWC) before July 1, 2000. However, no one can predict the outcome.
>
> In addition to the advice given in the CHA memo, information prepared by labor attorney Richard Simmons is attached for your information.
>
> The safest course of action would be to make equivalency adjustments and convert to 12-hour shifts of 8 regular hours plus 4 overtime hours before December 31, 1999. This will protect you in the event that the IWC does not act to extend the use of straight-time 12-hour shifts.

The attached memo authored by attorney Richard Simmons contains a legal summary of the changes resulting from AB 60, including the fact that, under the new law, hospitals would no longer be permitted to pay straight time for the entirety of a 12-hour shift. It does not reference equivalency pay reductions, but states that hospitals that "currently pay straight time wages for all 12 hours may wish to transition to a program that includes eight hours of straight time and four hours of overtime for each 12-hour shift." It also discusses the option of a 10 hour shift and directs members to consult their attorneys prior to acting.

The "CHA memo" described in the first paragraph of the email refers to a document that HASC had previously distributed to its members. The CHA memo summarizes its efforts in lobbying the Governor and the IWC to extend an exemption in AB 60 that permitted health care employers to continue using 12-hour shifts without overtime until July 1, 2000.[12] The CHA memo explained that, in its view, it had made

[12] Although AB 60 went into effect on January 1, 2000, it contained an exemption for 12-hour shifts in hospital if they were put in and legal prior to 1998. This exemption

positive inroads in persuading authorities to extend the exemption beyond the July 1, 2000 date, but advised members that "[e]mployers can take the 'safe' route and . . . convert all 12-hour shifts to 8 straight hours and 4 overtime hours." It further states that "based upon assurances given to me and my trust in the Governor, I urge you to give serious consideration to continuing your straight time 12-hour shifts." The memo also includes a statement advising members to "consult its legal and labor counsel before making a decision. Recognizing that you are dependent on CHA's success in obtaining a permanent extension . . . by the IWC, you have no choice but to weigh the consequences of all options and to make your decision expeditiously."

Plaintiffs argue that the HASC's statement that "[t]he safest course of action would be to make equivalency adjustments and convert to 12 hour shifts of 8 regular hours plus 4 overtime hours before December 21, 1999," provides sufficient circumstantial evidence to infer that the HASC and Hospital Defendants conspired to adopt equivalency pay reductions. Considered in isolation, the statement appears to invite a specific course of conduct: the adoption of equivalency pay reductions. However, when the full text of the email is considered in conjunction with the CHA and Richard Simmons memos, the language in the email "also could be construed in a benign light." (*Citric Acid*, *supra*, 191 F.3d at p. 1104.) Collectively, the information HASC circulated to its members described numerous possible responses to AB 60 and encouraged each hospital to consult its individual attorney before adopting a course of conduct. The initial CHA memo suggests that, as a result of the CHA's lobbying efforts, hospitals might consider retaining 12-hour shifts at straight pay. A second option, referred to as the "safest course" in the CHA memo, was to replace 12-hour shifts with 8 hour shifts and four hours of overtime. Finally, a third option, described as the "safest course" in the HASC memo, was to retain 12-hour shifts with an equivalency pay reduction.

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only lasted until July 1, 2000, and was intended to provide the IWC time to study and determine whether or not to continue them and under what terms and conditions.

Because the email and associated memos describe no less than three options available to employers, and encourage each hospital to discuss the matter with their individual attorneys and "weigh the consequences of all options" before making a decision, Plaintiffs' evidence could be construed as an effort by HASC to provide a variety of legal options to their members that could then be considered before independently deciding an appropriate course of action.

Where a piece of evidence may be "interpreted as evidence of a horizontal conspiracy but also could be construed in a benign light . . . [the evidence is] not sufficient in itself to preclude summary judgment." (*Citric Acid, supra,* 191 F.3d at p. 1104.) The "Safest Course Memo" qualifies as exactly that: it is susceptible to multiple interpretations that are as consistent with collusion as with lawful activity. (See *ibid*.; *Richards, supra,* 810 F.2d at p. 903 [phrase "gentlemen's agreement" susceptible to multiple interpretations]; *Baby Food, supra*, 166 F.3d at p. 127 [competitor's statement that it had a "truce" in effect was as consistent with independent behavior as with price fixing].)

C. Additional statements and documents from third party hospitals

Finally, Plaintiffs cite to additional statements and documents indicating that third party hospitals were collectively discussing AB 60 and were aware that several competitors intended to impose equivalency reductions. This evidence includes: (1) deposition testimony from the named plaintiff, who worked at Tenet Hospital (a non-defendant), stating that the head of her Human Resources (HR) group informed a group of Tenet employees that the hospitals were all getting together, "trying to figure out a way to keep your 12-hour shifts"; (2) notes from a Tenet hospital administrator that make reference to the fact that some competitors were adopting equivalency pay reductions, and; (3) a memo from Riverside Hospital to its employees stating that 75 percent of hospitals affected by AB 60 had adopted some form of equivalency pay reduction.

The statement made by Tenet's HR representative that hospitals were "getting together . . . to figure out a way" to retain 12-hour shifts was clearly ambiguous and can be interpreted in any number of ways. While Plaintiff asserts that it may be inferred from the statement that hospitals were working together to formulate a uniform response to AB 60 in the form of equivalency pay reductions, an alternative interpretation is that the HR representative was referring to the hospitals' efforts to convince the Governor and the IWC to exempt hospitals from AB 60's new overtime requirement. A third possibility is that the HR representative simply meant that the hospitals were meeting and conferring to discuss alternative responses to AB 60, which the hospitals would then review and adopt as they saw fit for their specific institution. "Because the circumstantial evidence was as consistent with permissible competitive behavior as with illegal conspiracy - and thus did not tend to exclude the possibility of legitimate behavior," the HR representative's statement is "not sufficient for [plaintiffs] to overcome defendants' summary judgment motion." (*Citric Acid, supra*, 191 F.3 at p. 1095; see also *Baby Food, supra*, 166 F.3d at p. 127 ["the single use of the term ['truce'] in a highly competitive business environment and in the face of continuing fierce competition is as consistent with independent behavior as it is with price-fixing"]; *Richards, supra*, 810 F.2d at p. 903 [phrase "gentlemen's agreement" could be interpreted as evidence of lawful conduct].)[13]

The other evidence, which includes written notes indicating that a non-defendant hospital had gathered information about how other hospitals were responding to AB 60 and a memo from a non-defendant hospital informing its employees that 75 percent of other hospitals were imposing "these types of programs," merely demonstrate that some hospitals were gathering information about their competitors' practices. It is well-established that "[g]athering competitors' price information can be consistent with independent competitor behavior." (*Baby Food, supra,* 166 F.3d at p. 126.) Indeed, in

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[13] Even if Plaintiffs' interpretation was the only plausible interpretation of the HR representative's statements, courts have repeatedly held that "evidence of sporadic exchanges of shop talk" is generally insufficient to survive summary judgment on an antitrust claim. (*Baby Food, supra,* 164 F.3d at p. 125.)

Eddins, the court concluded that although the plaintiff had demonstrated that competitors' files were "overflowing" with each other's pricing data, "'the mere possession of a competitor's price-related documents, even with evidence of parallel pricing, has been held not to give rise to an inference of a price-fixing agreement.' [Citation.]." (*Eddins, supra,* 134 Cal.App.4th at pp. 307-308.)

D. Summary of traditional evidence of conspiracy

Because courts should avoid "tightly compartmentalizing" factual evidence at the summary judgment stage of an antitrust action, (C*ity of Long Beach v. Standard Oil Co.* (9th Cir. 1989) 872 F.2d 1401, 1404-1405), we briefly discuss whether Plaintiffs' evidence of traditional conspiracy, considered as a whole, is sufficient to raise an inference of collusion. In sum, the evidence shows that HASC was holding informational meetings regarding AB 60 during which equivalency pay reductions were discussed and described as lawful. At those meetings, some hospitals described different ways they intended to respond to AB 60, a majority of which involved equivalency pay reductions. The HASC also circulated emails and legal memos describing different responses to AB 60 and one document called equivalency pay reductions the "safest course." Finally, there is evidence that hospitals were interested in how competitors were responding to AB 60 and gathered information about those responses.

Considered together, this evidence is as consistent with lawful behavior as with collusion and does not "tend[] to exclude . . . the possibility" that each Hospital Defendants' response to AB 60 was the result of independent action, rather than through a collusive agreement. (*Aguilar, supra,* 25 Cal.4th at p. 852.) It is not surprising that, in response to a significant and complicated change in labor law that would have wide ranging impacts on the medical industry, hospitals and their trade association would gather to educate themselves about what new requirements the legislation would impose and how they might respond. Nor is it surprising that a trade association like HASC would distribute informational literature about the legislation or offer advice about how to respond. All of these acts would be normal and expected in the absence of a collusive agreement. In sum, the hospitals' course of conduct is entirely consistent with lawful

behavior. At most, the evidence shows that the Hospital Defendants "possessed the . . . opportunity[] and means to enter into an unlawful conspiracy. But that . . . is not enough. Such evidence merely allows speculation about an unlawful conspiracy. Speculation, however, is not evidence." (*Id.* at p. 864.)

e. Additional reasons supporting trial court's ruling

Plaintiffs' evidence is insufficient to establish any of the factors necessary to prevail on a claim of unlawful collusion predicated on the theory of "conscious parallelism." Although those evidentiary deficiencies provide adequate grounds to affirm the trial court's grant of summary judgment, there are two additional problems with Plaintiffs' case that warrant further discussion.

i. Adoption of equivalency pay reductions was a response to change in legislation

First, Plaintiffs' briefs largely ignore the fact that hospitals adopted equivalency pay reductions only after the Legislature amended overtime laws in a manner that would have significantly increased the costs of retaining 12 hour nurse shifts without decreasing nurses' hourly base pay. A "suggestion of conspiracy or agreement which might arise from parallel conduct is lessened considerably where such conduct occurs in the context of common 'outside' factors, existing independent of and prior to any actions by the defendants and to which such actions might reasonably be considered a response." (*Harlem River, supra*, 408 F.Supp. at p. 1278).

If numerous hospitals had cut nurse pay by 15 percent in the face of a nursing shortage without any apparent justification for the salary decrease, Plaintiffs might have a stronger case. (*Independent Iron Works, Inc. v. U.S. Steel Corp.* (1963) 322 F.2d 656, 661 ["inference of conspiracy, based upon the defendants' approximately simultaneous change in their manner of dealing with plaintiff, might have been permissible in the absence of evidence showing that . . . outside factors dictated the change"].) Here, however, hospitals decision to impose equivalency pay reductions is readily explained by the passage of AB 60. (See *Southway Theatres, supra,* 672 F.2d at p. 494 ["inference of a conspiracy is always unreasonable when it is based solely on parallel behavior that can

be explained as the result of the independent business judgment of the defendants"].) This is a unique factor which is not present in any of the cases Plaintiffs cite and discuss in their briefs.[14]

[14] Plaintiffs rely primarily on six cases that, in their view, require a reversal here. In four of the cases, there was substantial evidence that defendants engaged in uniform behavior that could not be explained by any benign motive. That element is wholly lacking here. (See *Flat Glass, supra,* 385 F.3d at p. 362 [inference of price fixing agreement reasonable where "no evidence suggests that the increase in . . . prices was correlated with any changes in costs or demand" and cooperating witness provided proffer that numerous companies had entered into "an agreed upon, across the board price increase for the entire United States"]; *Interstate Circuit v. United States* (1939) 306 U.S. 208, 222 [inference of agreement reasonable where, after receiving identical request from major supplier, Defendants engaged in uniform conduct that amounted to "radical departure from the previous business practices of the industry and a drastic increase in . . . prices" that could not be explained by benign motive]; *Toys "R" Us, supra,* 221 F.3d at p. 932 [inference of agreement permissible where defendant toy manufacturers uniformly agreed to retailer's request to limit business with warehouse clubs and evidence showed: (1) defendants' conduct was "an abrupt shift from the past;" (2) defendant' had previously been "interested in cultivating a relationship with the warehouse clubs and increasing sales there," and (3) "manufacturers were unwilling to limit sales to the clubs without assurances that their competitors would do likewise"]; *City of Long Beach v. Standard Oil Co., supra,* 872 F.2d at p. 1406 [inference of agreement reasonable where evidence showed defendant oil companies engaged in "unusual effort" to maintain an elaborate, "cumbersome and inconvenient" pricing scheme that had no demonstrated advantage over valuing oil using posted prices, which was "inexplicable absent a conspiracy"].) The fifth decision discussed by Plaintiffs, *North Texas Specialty Physicians v. F.T.C.* (5th Cir. 2008) 528 F.3d 346, does not reference the doctrine of conscious parallelism or apply any of the factors used to evaluate circumstantial evidence of an agreement predicated on uniform conduct. The sixth case involved substantial, persuasive circumstantial evidence of collusion that is not present here. (See, e.g., *American Column & Lumber Co. v. U.S.*(1921) 257 U.S. 377, 393-394 ["Open Competition Plan" administered by trade association involved distribution of member "information on [competitor] prices, trade statistics and practices" and was described as an effort to a ensure "certain uniformity of trade practice," "replace undesirable competition" with "co-operative spirit," and to organize "hardwood manufacturers . . . into one compact, comprehensive body, equipped to serve the whole trade in a thorough and efficient manner"].)

ii. Plaintiffs have identified no evidence implicating Named Defendants

A second pervasive problem with Plaintiffs' case is that they rely almost entirely on evidence of conduct engaged in by hospitals that are not defendants in this case. None of the evidence Plaintiffs cite in their briefs demonstrates that any named hospital attended an HASC-hosted meeting or phone call, discussed AB 60 or equivalency pay reductions with any other hospital or were aware of how other hospitals were responding. Instead, Plaintiffs rely almost exclusively on (1) testimony and documentary evidence from Tenet Hospitals and Riverside Hospitals, none of which reference any defendant named in this lawsuit, (2) HASC documents and emails that, although purportedly sent to all HASC members, were never shown to be in the possession of, or reviewed by, any employee of any defendant who was responsible for formulating a response to AB 60.

Thus, even if we assume that Plaintiffs' evidence was sufficient to allow a reasonable trier of fact to infer that Tenet or other non-defendant hospitals engaged in collusive activity, there is insufficient evidence to support the further inference that Defendant Hospitals also participated in that activity. (See, e.g., *Citric Acid, supra,* 191 F.3d at p. 1098 [it "would not be reasonable to infer" defendant entered unlawful agreement based on notes from a meeting defendant did not attend]; *Clamp-All Corp. v. Cast Iron Soil Pipe Institute, supra,* 851 F.2d at p. 484 ["jury could not find, without impermissible speculation, that . . . defendants priced couplings below their costs" based on evidence showing price list of competitor's couplings].") Simply put, we are aware of no antitrust decision that has permitted an inference of collusion against the named defendants based solely on evidence of third party conduct, without any evidence of direct communications between the defendants and any competitor.

f. Plaintiffs have failed to address Aguilar's standard of review

Finally, we briefly address Plaintiffs' assertion that the trial court improperly weighed the evidence in this case when it determined how certain pieces of evidence might be interpreted. In Plaintiffs' view, such acts were "contrary to the well-known admonition that on summary judgment a trial court must not weigh evidence and instead

must draw all inferences in favor of the nonmoving party." Because we have reviewed all the evidence in this case de novo, we need not consider whether the trial court improperly weighed the evidence.

We do note, however, that Plaintiffs' argument fails to consider that courts have a unique role in assessing evidence in the context of a motion for summary judgment seeking dismissal of an antitrust claim asserting collusive action. In analyzing any motion for summary judgment, a "court may not weigh the plaintiff's . . . evidence, [but] it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact*." (*Aguilar, supra*, 25 Cal.4th at p. 856.) In antitrust cases, "certain inferences may not be drawn from circumstantial evidence." (*Eddins, supra*, 134 Cal.App.4th at p. 328.) Specifically, "conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." (*Matsushita, supra*, 475 U.S. at p. 588.) Therefore, to determine whether a trier of fact may infer collusive activity from circumstantial evidence, courts are regularly forced to consider whether evidence can be interpreted in a manner that is as consistent with lawful action as with collusion. (See *Richards, supra*, 810 F.2d at p. 903 [affirming summary judgment where deposition testimony was susceptible to "at least three interpretations," only one of which was consistent with a "horizontal agreement"]; *Citric Acid, supra*, 191 F.3d at p. 1104 ["evidence [that] could be interpreted as evidence of a horizontal conspiracy but also could be construed in a benign light . . . cannot independently support an inference of conspiracy"].)

Although Plaintiffs' briefs restate these principles in describing the appropriate standard of review, they consistently fail to explain why the evidence they cite is inconsistent with lawful activity. Instead, Plaintiffs appear to assume that if a piece of evidence may be reasonably interpreted as suggesting collusion, that is sufficient to survive summary judgment. As *Aguilar* makes clear, however, that is not the law.

B. The Trial Court Did Not Abuse its Discretion in Limiting Discovery

1. Summary of discovery in the trial court

At the outset of the litigation, the trial court informed the parties that it had devised specialized discovery procedures that required plaintiffs and defendants to informally meet and confer about proposed discovery requests in advance of service, and then submit a joint statement explaining any requests on which they could not reach consensus. The court then held a status conference to review the contested discovery requests and submitted an order describing what discovery it was authorizing and the date by which each party had to respond. The trial court explained that the process was intended to "resolve . . . disputes before I authorize discovery to proceed," noting that it had not "had any significant discovery motions . . . in five years; it seems to work."

Utilizing this process, the court granted several of Plaintiffs' discovery requests and denied others, including for, for example, third party discovery intended to identify additional hospitals that adopted equivalency pay reductions, internal documents from Hospital Defendants discussing any aspect of AB 60 and the deposition of an attorney who mediated several HASC-hosted events regarding AB 60.

In July of 2008, Defendants filed their motions for summary judgment. Shortly thereafter, the trial court instructed Plaintiffs to review the motions and submit a statement describing what further discovery would be necessary to prepare their opposition. According to the court, the process was intended to "[t]ake the [437c, subd. (h)] component out of [the summary judgment] opposition[]." In response, Plaintiffs submitted a list of several specific discovery requests and one catchall request that the court remove "[all] limits on plaintiffs' discovery." The court granted most of Plaintiffs' individual requests but refused to remove "all limits" on discovery. It then entered an order providing Plaintiffs three months to conduct additional discovery and file their opposition, later extending the deadline by an additional month at Plaintiffs' request.

In November of 2008, Plaintiffs filed their opposition, which argued, in part, that they were entitled to a continuance to obtain further discovery pursuant to Code of Civil

Procedure section 437c, subdivision (h). The opposition contended that "the Court has previously denied reasonable discovery requests," and listed each category of discovery that had been limited or denied by the court. A declaration accompanying the opposition repeated each category of discovery the court had denied and stated that "Plaintiffs have been deprived of the right to fundamental discovery that is normally 'standard fare' in antitrust litigation."

In its ruling on Defendants' motion for summary judgment, the court denied a continuance, noting that Plaintiffs had failed to meet the relevant standard applicable under Section 437c, subdivision (h), which requires an "affidavit[] . . . [¶] . . . [¶] . . . detailing facts that would establish the existence of controverting evidence, and the reasons why such evidence could not be presented at the time of the hearing." (*American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, 1280.)

On appeal, Plaintiffs contend that, during the course of the litigation, the trial court abused its discretion in denying seven different categories of discovery. Plaintiffs have not challenged the specialized discovery procedures the court utilized in managing discovery, nor do they challenge the court's ruling that Plaintiffs' request for a continuance failed to satisfy the requirements of Code of Civil Procedure section 437c, subdivision (h). Instead, as stated in their briefs, Plaintiffs argue only that the trial court abused its discretion "in denying discovery during the course of the litigation," which, according to Plaintiffs, "has nothing to do with Code of Civil Procedure § 437c[, subdivision] (h)."

2. Standard of review

"'Management of discovery lies within the sound discretion of the trial court. Consequently, appellate review of discovery rulings is governed by the abuse of discretion standard. Where there is a basis for the trial court's ruling and the evidence supports it, a reviewing court will not substitute its opinion for that of the trial court. [Citation.]' The trial court's determination will be set aside only when it has been established that there was no legal justification for the order granting or denying the

discovery in question." (*Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 246.)

3. The trial court did not abuse its discretion

Plaintiffs argue that the trial court abused its discretion when it denied seven categories of evidence that were "reasonably calculated to lead to the discovery of admissible evidence," (Code Civ. Proc., § 2017.010), including: (1) interrogatories directed toward non-defendant hospital members of HASC which were intended to identify additional hospitals that had imposed equivalency pay reductions; (2) document requests seeking Defendant Hospitals' internal communications reflecting any discussion of AB 60; (3) discovery directed toward non-defendant California Hospital Association; (4) the deposition of Richard Simmons, who was the attorney of a "Doe Defendant," and mediated various HASC-hosted events regarding AB 60; (5) depositions of the persons most knowledgeable at labor unions representing nurses and respiratory therapists, which was intended to identify additional non-defendant hospitals that imposed equivalency pay reductions; (6) a "*Pioneer* notice" intended to identify potential substitute named plaintiffs; and (7) a second round of depositions of persons who were most knowledgeable about the Hospital Defendants' implementation of equivalency pay reductions.[15]

a. Discovery relating to non-defendant members of HASC

Plaintiffs sought to propound written interrogatories on every non-defendant hospital that was a member of HASC, which consisted of over 150 third-party entities. The discovery request consisted of seven interrogatories requiring each non-defendant hospital to: (1) state whether they had adopted an equivalency pay reduction; (2) describe the reasons for implementing (or not implementing) such a reduction; (3) identify any meeting or written communication with HASC or any other hospital that

[15] Plaintiffs' briefs also reference the trial court's "refusal" to address claims that HASC had failed to abide by a "litigation hold" and spoliated evidence. Plaintiffs have not, however, appealed any specific issue related to those spoliation claims and we therefore do not address them.

included a discussion of equivalency pay reductions; and (4) provide a detailed description of the persons involved in any such discussions and the subject matter of the discussion. Plaintiffs alleged that the information was necessary to identify additional hospitals which had adopted an equivalency pay reduction so that those entities could be added to the suit as named defendants.

The trial court affirmed Defendants' objection to this request, explaining that Plaintiffs should focus their initial discovery "toward the eight or 10 [named hospital defendants], for purposes of developing whatever you need to establish the existence of a conspiracy, to validate the secret meeting, and different things like that . . . with the understanding that ultimately if you have viable antitrust claims you are going to be able to discover potentially the additional participants, and to go out and do more." At a later status conference, the court reiterated that "as a starting point you ought to be able to develop something with the parties that you've sued. And either you have an agreement among the parties you've sued and [HASC] . . . but to go out to every other hospital or any other hospitals until you have the basics, seems to me to be going beyond what you need to do. Or what's appropriate. [¶] And at some stage you may be able to reach out to other entities and bring other people in."

Based on the court's statements, it was obviously concerned that the burdens associated with opening discovery to over 150 additional third parties (and their counsel) was not justified unless and until Plaintiffs discovered some evidence substantiating the existence of an agreement among the defendants who were named in the complaint. We think it beyond dispute that Plaintiffs' proposed discovery – which would require virtually every hospital in Southern California to detail any oral or written discussion it had with HASC or any other hospital about equivalency pay reductions – would have greatly complicated the management of the case.

The trial court's decision to limit discovery of third parties does not constitute an abuse of discretion. California's discovery statutes "vests the trial court with discretion to . . . limit[] the scope of discovery if the court determines the burden expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information

sought will lead to the discovery of admissible evidence." (*Pratt v. Union Pacific Railroad Co.* (2008) 168 Cal.App.4th 165, 181 [citing and quoting Code Civ. Proc., § 2017.020].) Moreover, our courts have recognized that "when dealing with an entity which is not even a party to the litigation, the court should attempt to structure discovery in a manner which is least burdensome to such an entity." (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 222.)

Plaintiffs have offered no argument indicating why the court erred in concluding that the burdens associated with expanding discovery to hundreds of non-party entities outweighed the likelihood that such discovery would lead to evidence that the named Hospital Defendants engaged in collusive activity. At the trial court, the Plaintiffs repeatedly argued that the purpose of this discovery was not to develop its claims against the named defendants but rather to identify additional hospitals to add to the suit. We find no error in the trial court's conclusion that discovery intended to identify additional defendants, rather than developing claims against the parties actually involved in the suit, should be deferred unless and until Plaintiffs discovered some evidence that the named plaintiffs engaged in a conspiracy.

b. Hospital Defendants' internal documents reflecting discussions of AB 60

Plaintiffs next contend that the trial court erred in denying its request that each Hospital Defendant produce "all internal documents, including emails, memoranda, notes, etc. relating to A.B. 60." During a status conference, Plaintiffs explained that its request was seeking "anything that [the Defendant Hospitals] have for the last six months of 1999 that's related to AB 60."

The record indicates that, although the trial court denied Plaintiffs' request for all internal documents related to any aspect of AB 60, it did permit Plaintiffs to seek a wide array of other documents evidencing communications between the Hospital Defendants and HASC or other hospitals. Specifically, the court permitted the Plaintiffs to seek (1) all documents from Hospital Defendants "evidencing AB 60-related communications directed to or received from Hospital Association of Southern California;" (2) all

documents from HASC "evidencing AB 60 related communications directed to or received from the California Hospital Association" or any member hospitals, (3) and all HASC documents "evidencing communications . . . among [HASC] officers and/or employees relating to AB60;"

In addition, at the outset of the litigation, the court permitted Plaintiffs to seek documentation from the Defendant Hospitals "relating to the adoption or modification of 12 hour pay plans and communication relating to 12-hour pay plans among Defendants." In response to this order, Plaintiffs issued a request for production seeking documents from the Hospital Defendants reflecting "any discussion or review among or between two or more hospitals relating to a PAY PLAN that reduced or otherwise altered the hourly pay of hospital nurses or technical care specialists working 12 hour shifts."[16] The record also suggests that Defendants complied with this request.

Finally, the court issued an order permitting Plaintiffs to take 10 depositions of any defendant or non-defendant hospital to investigate meetings regarding the implementation of equivalency pay reductions and the role of HASC in facilitating the hospitals implementation of the equivalency pay reductions. In response to that order, Plaintiff sought "permission to include document requests with the deposition notices, including for third party witnesses," for any "(a) documents relating to the decision making process for implementation of a pay plan and (b) documents reflecting communications of any kind, whether directly or indirectly, with other hospitals of affiliates regarding pay plans. The trial court granted the request provided that "such requests are limited to documents evidencing the foundational meetings or contacts that Plaintiffs must establish to support their antitrust claims."

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[16] Although Defendants allege that Plaintiffs propounded this request, to our knowledge, the record does not actually include a copy of the request. It does, however, contain a filing stating that Defendants did not object to document requests regarding "who discussed such a plan with other hospitals and with HASC." In any event, Plaintiffs have not contested Defendants' representation that such a request was propounded nor do they contest Defendants' assertion that they complied with this document request.

Based on our review of the record, it appears that the trial court provided the Plaintiffs ample opportunity to seek documents reflecting communications (internal or otherwise) between the Hospital Defendants and HASC or other hospitals about equivalency pay reductions. However, it did not agree with Plaintiffs' request to require each Hospital Defendant to produce "anything . . . that's related to A.B. 60."

The limitation the court imposed on internal documentation was not an abuse of discretion. Plaintiffs' complaint is predicated on the theory that the Hospital Defendants colluded to adopt equivalency pay reductions as a result of AB 60's daily overtime provisions. However, evidence in the record shows that AB 60 changed a wide variety of wage-hour practices other than daily overtime provisions, including, in part, amendments to the white collar exemption, meal period provisions and the rules regarding "alternative workweek schedules."[17] As the trial court apparently concluded, Plaintiffs' request to seek "any" communication related to AB 60 was therefore likely to produce numerous documents that were completely unrelated to equivalency pay reductions. We find no

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[17] A memo HASC distributed to its members contains a more thorough list of the changes implemented by AB 60:

> Many employers have been led to believe that AB 60 simply reinstates the daily overtime provisions of state law that were repealed by the IWC on January 1, 1998. In reality, AB 60 is much broader and affects many wage-hour practices. For example, in addition to reinstating the daily overtime rules, it established four other overtime zones. It does not stop there. AB 60 dramatically changes the rules regarding the 'white collar exemptions,' changes the meal period provisions, adds a 'make up time' rule, creates a standard regarding commuting time in ridesharing vehicles, modifies the existing overtime pay exemption for union employees, creates personal liability, establishes a system for the DLSE to issue citations to alleged violators, and does various other things.
>
> It also establishes new rules regarding 'alternative workweek schedules' that will preclude shifts exceeding 10 hours at straight time and replace the 'flexible work arrangement' provisions that CHA had fought hard to establish almost a decade ago. As a practical matter, it will outlaw most of the 12-hour shift arrangements that now exist in the industry.

abuse of discretion in the trial court's refusal to permit the Plaintiffs to seek such a broad segment of documents.

c. *Written discovery directed toward nurse unions*

The next category of discovery sought by Plaintiffs was "the deposition of . . . the persons most knowledgeable at labor unions representing nurses and respiratory therapists in Southern California." Plaintiffs conceded that they were seeking this information not to develop their claims against the parties named in the complaint but rather to "identify co-conspirator[]" hospitals that adopted equivalency pay reductions, theorizing that unions were likely to know which hospitals adopted such reductions. As Plaintiffs stated during one status conference "we're not looking at [the unions] to establish the conspiracy, we're looking at them . . . because their records and/or people [could identify additional] potential . . . conspirators who adopted pay plans."

In response to this request, the trial court re-asserted the same concerns it had regarding discovery directed at non-defendant hospitals, stating that "there needs to be a little more meat on the bone for agreements and conspiracy and other things before you go out and look for other conspirators. I think your focus ought to be for putting the meat on the bone." The court did not, however, deny the request outright. Instead, it requested that the Plaintiffs provide "additional information concerning the number of unions potentially involved in providing nurses and respiratory therapists to the Hospital Defendants before permitting third party depositions directed to these unions." In other words, before granting the request, the court wanted to know how burdensome the request would be and how much it would complicate management of the case.

Plaintiffs have pointed to nothing in the record indicating that they complied with the trial court's request to produce information about the number of unions from which it was seeking discovery. Therefore, it was impossible for the trial court to evaluate the breadth of Plaintiffs' request.

Additionally, for the reasons stated above in relation to Plaintiffs' request to propound interrogatories on non-defendant members of HASC, we cannot conclude that the trial court abused its discretion in denying discovery directed at third party witnesses

that was intended to identify additional co-defendants rather than establish the liability of the parties actually named in the suit.

d. Deposition of attorney Richard Simmons

Plaintiffs requested permission to depose Richard Simmons, who served as counsel for Memorial Health Services, which Plaintiffs named as a "Doe Defendant" to the First Amended Complaint. According to third-party witnesses, Simmons had served as a speaker at HASC-hosted conferences and phone calls regarding AB 60. In addition, Simmons authored a legal memo summarizing AB 60 that HASC circulated to its member hospitals.

Defendants objected to Plaintiffs' deposition request, arguing that California courts have recognized that deposing opposing counsel is "presumptively improper." The trial court agreed and entered an order stating that "[t]he Court will not permit the deposition of Mr. Simmons absent a foundational showing of the viability of Plaintiffs' factual allegations and the relevance of his testimony."

On appeal, Plaintiffs have not disputed that Simmons is an "opposing counsel" in this case and we therefore assume he qualifies as such.[18] Plaintiffs also appear to concede that, in California "the circumstances under which opposing counsel may be deposed" are extremely limited and requires the moving party to demonstrate that "(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and not privileged; (3) the information is crucial to the preparation of the case." (See generally *Spectra-Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487, 1496.)

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[18] The record is ambiguous on this point. Simmons is counsel of record for Memorial Health Services (MHS). In June of 2007, Plaintiffs filed a form "Amendment to Complaint" identifying MHS as "Doe defendant number 4." It is unclear whether Plaintiffs named MHS in their second or third amended complaints. However, because Plaintiffs have never contended that Simmons is not an opposing counsel, we need not address the issue.

Plaintiffs have made no attempt to describe why these requirements were satisfied here, stating only that the need for Simmons' testimony is "self evident." That statement is clearly insufficient to meet the strict requirements of *Spectra-Physics.*

Additionally, Plaintiffs assert that we should not apply *Spectra-Physics* in this case because Simmons decided to "to undertake representation in this case – when he knew full well that he was a potential percipient witness given the allegations in the operative complaint." This conclusory argument appears in a footnote and is unaccompanied by any legal citation, legal argument, or references to the record. We therefore treat the argument as waived. (*Stanley, supra,* 10 Cal.4th at p. 793 ["'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' [Citations.]"]; *Lyles, supra,* 153 Cal.App.4th at p. 285, fn. 3 [refusing to review argument raised "in conclusory fashion via footnote"]; *Mansell, supra,* 30 Cal.App.4th at p. 545 [reviewing court is not "required to search the record to ascertain whether it contains support for [a parties'] contentions"].)

e. California Hospital Association

Plaintiffs contend that the trial court abused its discretion in denying discovery requests from the California Hospital Association (CHA), which, according to Plaintiffs' briefs, "was a direct participant with HASC in implementing the strategy for the pay reduction scheme." Plaintiffs' briefs fail to cite to any portion of the record in which they actually requested discovery from CHA,[19] they fail to cite any portion of the record in which the trial court denied or otherwise discussed discovery requests directed at CHA and they fail to explain or cite any evidence from the record indicating why information from CHA was necessary.

A reviewing court is not "required to search the record to ascertain whether it contains support for [a parties'] contentions." (*Mansell, supra,* Cal.App.4th at p. 545.) Appellant's Appendix contains 14 volumes and over 3000 pages, in addition to several

[19] The only reference to the record on this point is to document requests seeking CHA-related documents from non-defendant hospital members of HASC.

hundred pages of hearing transcripts. As a result, we decline to "make an unassisted study of the record in search of" documentation establishing whether discovery directed toward CHA was warranted. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 (*Guthrey*) ["As a general rule, 'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment'"].)

Additionally, Plaintiffs' conclusory statement that the trial court should have permitted it to obtain documents from CHA because it was a direct participant in the conspiracy, without any relevant legal citations or discussion of the law, is insufficient to raise the issue on appeal. (*Stanley, supra,* 10 Cal.4th at p. 793 ["'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' [Citations.]"].)

f. Plaintiffs' request for "Pioneer" notices

Plaintiffs requested that, pursuant to the procedures described in *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, the trial court order Hospital Defendants to disclose the contact information of potential class members. Although Plaintiffs argue on appeal that this information was requested "to identify other Class Members with material information," the record demonstrates that, in fact, Plaintiffs represented to the trial court that they were seeking this information "to address Defendants[']s concerns that named Plaintiffs are not fit to serve as proper class representatives." During the trial court proceedings, Defendants informed Plaintiffs and the court that they might seek summary adjudication against the named plaintiffs on the ground that they lacked standing. Plaintiffs' counsel asserted that the *Pioneer* notice request was "calculated to deal with this problem." In sum, Plaintiffs' request was intended to identify potential alternative named plaintiffs in the event that the currently named plaintiffs were found to lack standing.

The court chose to defer Plaintiffs' request, explaining that if it became necessary for Plaintiffs to identify a "substitute plaintiff" as the result of the standing issues, the

court would revisit the *Pioneer* request. Plaintiffs' counsel was apparently satisfied with this resolution, stating "that's the assurance basically I am looking for." Ultimately, the Defendants' motions for summary judgment did not raise the issue of standing and, as a result, the court never revisited Plaintiffs' request for class member information.

Under the circumstances of this case, the trial court reasonably concluded that there was no reason to go forward with the *Pioneer* notification measures unless and until the named Plaintiffs were found to lack standing. Accordingly, we find no abuse of discretion.

g. Additional "persons most knowledgeable" depositions

Finally, Plaintiffs sought authorization to "depose additional Hospital Defendants' employees who were actually the most knowledgeable on the implementation of the pay reduction schemes." Plaintiffs' briefs assert that this request was necessary because a number of witnesses produced by Defendants had little or no actual knowledge of the key facts or events. The only references to the record cited in support of this argument refer to documentation demonstrating that Plaintiffs requested additional PMK notices. Plaintiffs do not cite any evidence substantiating that the witnesses the Defendants provided actually lacked knowledge of key facts or events, nor do they cite or discuss any portion of the record reflecting the trial court's rulings on this particular request. For the reasons stated in relation to Plaintiffs' contention that the trial court erred in denying discovery directed at CHA, we decline to "make an unassisted study of the record in search of" documentation establishing whether additional PMK depositions were warranted. (*Guthrey, supra,* 63 Cal.App.4th at p. 1115 ["As a general rule, 'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment"].)

C. Any Error in Sustaining the Demurrer to Plaintiffs' Section 17200 Claim was Harmless

Plaintiffs contend that the trial court erred in sustaining a demurrer to their unfair business practice claim (see Bus. & Prof. Code, § 17200). The trial court sustained Defendants' demurrer on standing grounds. On appeal, Plaintiffs argue that, although the

named plaintiffs were never employed by any of the named defendants, they had standing to assert a UCL claim against any hospital that participated in the alleged conspiracy. We need not address the standing issue because, even if the trial court's ruling was incorrect, any such error was harmless. (See Code Civ. Proc., § 475; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801-802 [harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818 applies to civil cases].)

Plaintiffs do not dispute that their UCL claim is based on the same conduct alleged in support of its Cartwright Act claim. Under such circumstances, a finding that the defendant has not violated antitrust law precludes a finding of unfair competition. (See *Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 375 (*Chavez*); *Eddins, supra,* 134 Cal.App. at p. 345 [affirming dismissal of UCL claim where same conduct found not to violate Cartwright Act]; *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 93 ["[i]n that Plaintiff cannot allege a Cartwright Action violation . . . the cause of action for a violation of the UCL also cannot stand"]; *DocMagic, Inc. v. Ellie Mae, Inc*. (No. Dist. Cal., October 2010, No. C09-04017 MHP) _____ F.Supp.2d [2010 U.S. Dist. Lexis 108628, *56] ["'[w]here ... the same conduct is alleged to support both a plaintiff's . . . antitrust claims and state-law unfair competition claim, a finding that the conduct is not an antitrust violation precludes a finding of unfair competition' [Citations.]"].) "To permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct." (*Chavez, supra,* 93 Cal.App.4th at p. 375.)

Because we have affirmed the trial court's ruling that Plaintiffs' failed to introduce evidence raising a triable issue of fact as to whether Defendants' violated the Cartwright Act, they are necessarily precluded from pursuing their unfair competition claim. Thus, even assuming the trial court erred in sustaining a demurrer to Plaintiff's UCL claim on standing grounds, any such error was harmless.

DISPOSITION

The trial court's Ruling and Order Re: Defendants' Motions for Summary Judgment and Judgment in Favor of Defendants are affirmed. Respondents are to recover their costs on appeal.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.